



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MOMBASA
ELC CASE NO. 430 OF 2010

MWINYI RAMA NGWAYA.....PLAINTIFF

VERSUS

LENNY MAZWELL KIVUTI

MOFFAT KANGI.....DEFENDANTS

RULING

(Application seeking orders to reinstate a suit dismissed for non-attendance; application allowed but subject to payment of thrown away costs)

1. The application before me is that dated 12 April 2017 filed by the plaintiff. It is an application said to be brought pursuant to the provisions of Section 80 of the Civil Procedure Act, Cap 21, and Order 45 Rules 1 and 3 of the Civil Procedure Rules, 2010. The application is seeking the following substantive order :-

That this Honourable Court be pleased to review and set aside its ruling and order delivered on 10th April 2017 dismissing the plaintiff's plaint and order reinstatement of the suit.

2. The application is opposed and before I go to the gist of it is prudent that I put matters into context.

3. This suit was commenced through a plaint which was filed on 1 December 2010. The plaintiff pleaded that he is the owner of the land parcel Kwale/Diani/317 and that he has been in possession since it was adjudicated. He averred that the land passed through his grandfather and his father. He pleaded that in October 2010, the 2nd defendant who is the District Commissioner Kwale, summoned him and asked him to vacate the suit land claiming that it belonged to the 1st defendant. In the suit, the plaintiff has asked that the defendants be restrained from the land, general damages for trespass and costs. A joint statement of defence was filed where the defendants contended that the suit property was first registered in the name of the 1st defendant on 9 July 1992 and that this is a first registration which is not defensible. They pleaded that the plaintiff connived with officials of the Ministry of Lands to create a fake title dated 4 December 2006. It was pleaded that a letter was written to the plaintiff on 22 October 2010 asking him to return the title which he has refused to do. They asked that his case be dismissed. Pleadings closed and I have seen that the plaintiff filed his witness statements and list of documents though I have not seen any filed by the defendant. The matter was listed for hearing a couple of times which hearings did not take off for one reason or another.

4. On 10 November 2016, counsel for the plaintiff took the hearing date of 10 April 2017 and served a hearing notice. On that day, Mr. Muyala held brief for Mr. Gikandi for the defendant but there was no appearance on the part of the law firm of M/s Khatib & Company Advocates for the plaintiff. Mr. Muyala applied for adjournment on behalf of Mr. Gikandi, on the ground that Mr. Gikandi was held up in the Environment and Land Court at Malindi, in Malindi ELC No. 25 of 2012, and sought another date. The court (A. Omollo J) however noted that the date had been fixed for hearing by the plaintiff, who was absent, and the case was dismissed for failure to prosecute with no orders as to costs.

5. Nothing happened until this application was filed on 15 January 2019, though the application itself is dated 12 April 2017. The application is supported by the affidavit of Mohamed Faki Khatib which also bears the date of 12 April 2017. He has deposed that on 10 April 2017, both himself and Mr. Gikandi were engaged in Malindi ELC No. 25 of 2012, and were thus unable to attend the hearing of this matter. He has deposed that he had agreed with Mr. Gikandi to adjourn the case owing to their engagement in Malindi. He has pointed out that on the hearing date, Mr. Muyala did seek an adjournment but did not bring up to the attention of the court that they had an agreement to adjourn. He has deposed that he had sent his clerk to get an advocate to hold his brief but the clerk could not access one.

6. The defendants/respondents have opposed the application through Grounds of Opposition. It is pointed out that the application has been

filed after the lapse of 21 months which delay is unreasonable and that the applicant is guilty of laches. It is further averred that it was incumbent upon Mr. Khatib to arrange for representation on the hearing date. It is further contended that because the Kwale Land Registrar is not a party, it will be impossible to impeach the title of the respondents. It is argued that the applicant has not tabled any material to state how he inherited the property.

7. Both counsel for the applicant and the respondent filed written submissions which I have taken into consideration. Ms. Karifa for the applicant and Mr. Gikandi for the respondents also made oral submissions which I have also taken into account.

8. Though the application is premised upon Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules, which address applications for review, in my opinion, this is not strictly speaking an application for review. The matter was dismissed for non-attendance of the plaintiff and this would have been pursuant to the provisions of Order 12 Rule 1 or 3, which provide for the dismissal of a suit for non-attendance of the plaintiff. Order 12 is self-executing and has a remedy under Rule 7, which allows for a party to set aside an order issued under the said Order 12. It follows that the correct provision of the law upon which an application such as this should be premised is actually Order 12 Rule 7 and not Order 45.

9. Be that as it may, I will consider the application on its merits instead of striking it out, or dismissing it on a technicality.

10. The reasons given for the non-attendance of counsel for the applicant was that counsel was engaged in the ELC at Malindi on another matter that he had with counsel for the respondents. The claim that the two counsel involved in this suit had this matter in Malindi is not refuted by the respondents' counsel. Nevertheless, it was incumbent upon counsel for the applicant to send an advocate to hold his brief and try to persuade the court to adjourn the matter. It was, in my view, careless for counsel for the applicant to assume that just because he had agreed with counsel for the respondents to adjourn, the court would automatically adjourn the case. It should be remembered that an adjournment is a matter within the discretion of the court and the court is not bound by any agreement to adjourn that parties or counsel may have entered into. The court was thus well within its discretion to dismiss the case as no explanation had been given for the absence of the plaintiff and/or his counsel.

11. It has been raised by the respondents that this application is coming very late in the day. On this point, I do agree. Actually no explanation has been given as to why this application was filed on 15 January 2019. To me, it doesn't matter that the application is dated 12 April 2017, for any date can be placed on an application, and what is important is the date of filing of the motion. There is a delay of close to two years since the order of dismissal was made and whichever way one wants to look at it, the delay is certainly inordinate.

12. Nevertheless, I do note that in this case, both parties claim to have title to the same parcel of land. I think it is in the interests of justice that the applicant be given a chance to ventilate whether or not his title is the genuine title or whether it is the respondents who have the genuine title. I think an opportunity needs to be given to the court to pronounce itself on which of the two titles is the genuine title. Even if I am to hold the position that the plaintiff's case remains dismissed, there will still continue being in existence two titles, and the issue of ownership will not have been resolved. If the plaintiff can show that he is serious with his case by paying thrown away costs as this court may order, I think he deserves to be given an opportunity to be heard if only to resolve the dispute surrounding the two titles. It is because of this sole reason that I feel that it will be just and expedient for the plaintiff's suit to be reinstated and he be given a chance to ventilate his case but subject to payment of thrown away costs. I am aware that Mr. Gikandi raised issues about the veracity and competency of the plaintiff's case but in my view those are matters that can only be resolved once the case is heard.

13. It is for the above reasons that I allow this application and reinstate the plaintiff's suit. However, this order will be subject to the payment of thrown away costs, which in my discretion I assess at Kshs. 20,000/=. These costs will have to be paid within the next 14 days, and if they are not paid, then this suit will stand dismissed.

14. The final order therefore is that subject to the payment of thrown away costs of Kshs. 20,000/= within 14 days from today, the plaintiff's suit be reinstated for hearing, and if the thrown away costs are not so paid, the plaintiff's case will stand dismissed.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Ongiri holding brief for Mr Khatib for the applicant.

Mr. Odeng holding brief for Mr Gikandi for the respondent.

Court assistant; Koitamet.